C.A. No. 1253 of 2003

The Appellant/Accused No. 5 Viz, Harun Batcha was directied to be released on Bail in and by the order of this Court dated 21/10/2003 in Crl.MP No 9196/2003.

C.A.No. 1200/2003

The appellant/Accused No. 6 Viz, Bilal Hajar @ Abdul Hameed was directed to be released on Bail in and by the order of this Court dated 04/02/2004 in CRl M.P.13283/2003.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Date : 8.11.2006

Coram

The Honourable Mr.Justice R.Balasubramanian
and
The Honourable Mr.Justice A.C.Arumugaperumal Adityan

CRIMINAL APPEAL Nos.1200, 1253, 1459 of 2003 and 291 of 2004

Bilal Hajar @ Abdul Hameed ... Appellant in C.A.No.1200/2003 /Accused 6.

Harun Batcha ... Appellant in C.A.No.1253/2003/A5

1. Zakir Hussain (A1)

2. Shahul Hameed (A2)

3. Babu @ Oomai Babu (A3)

4. Gafoor Rahman (A4)

5. Subhaiyar (A7)

6. S.A.Batsha (A8) ... Appellants in C.A.No.1459/2003

Tajudden (A9) ... Appellant in C.A.No.291/2004

-Vs.-

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State rep.by
The Inspector of Police
B.1-Bazaar Police Station
Coimbatore. ... Respondents in all the appeals
(Cr. No 1026/1991) (Complainant)

Appeals against the judgment dated 29.7.2003 made in S.C.No.239 of 2000 on the file of Additional District and Sessions Judge (Fast Tack Court No.3), Coimbatore.

For Appellants : Mr.AR.L.Sundaresan,Senior Counsel
for Mrs.AL.Gandhimathi for A.6
(C.A.No.1200 of 2003)

Mr.N. Manokaran for A.3 and A.5
(C.A.Nos.1459 and 1253 of 2003)

Mr.R.John Sathyan for A.1, A.2, A.4
A.7,A.8 (C.A.No.1459 of 2003)

Mr.V.Purushothaman for A.9
(C.A.No.291 of 2004)

For Respondent : Mr. N.R.Elango
Additional Public Prosecutor

J U D G M E N T

(Judgment of the Court was delivered by
R. Balasubramanian, J)

Totally nine persons were tried in S.C.No.239 of 2000 on the file of Additional Court of Sessions (Fast Track Court No.III), Coimbatore, for various offences. At the end of the trial, the learned Trial Judge acquitted A.5 of the offence under Section 302 I.P.C. and convicted the remaining accused put up for trial for various other offences. We will give details of the charges and conviction, a little later in this judgment. The convicted accused are before this court in these multiple appeals. Heard Mr.R. John Sathyan, learned counsel appearing for A.1, A.2, A.4, A.7 and A.8 (C.A.No.1459 of 2003); Mr.N.Manokaran, learned counsel appearing for A.3 and A.5 (C.A.Nos.1459/2003 and 1253 of 2003); Mr.AR.L.Sundaresan, learned Senior Counsel appearing for A.6 (C.A.No.1200 of 2003) and Mr.V.Purushothaman, learned counsel appearing for A.9 (C.A.No.291 of 2004). Mr.N.R.Elango, learned Additional Public Prosecutor defended the State.

2. The charges framed by the learned Sessions Judge against the accused are as hereunder:-

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120-B I.P.C. - A.1 to A.9
148 I.P.C. - A.1 to A.5
302 I.P.C. - A.1 to A.5
332 I.P.C. - A.1

At the end of the trial, the learned Trial Judge found on charge No.1 all the accused guilty and accordingly sentenced each one of them to undergo imprisonment for life. On charges 2 and 3, the learned Trial Judge found A.1 to A.4 alone guilty and acquitted A.5. The convicted accused stand sentenced to undergo imprisonment for life and one year rigorous imprisonment together with a fine on each count carrying a default sentence. On charge No.4, A.1 stands convicted for causing an injury on P.W.1, the police constable on duty and sentenced to undergo one year rigorous imprisonment. As stated earlier, the various accused are before this court in these multiple appeals.

3. The prosecution case is that within the jurisdiction of the investigating police station at Coimbatore on 19.8.1991 a number of materials were written in prominent places in the wall stating that it is a command from the God (FATWA). This hand written material was the subject matter of discussion in a public meeting held on 30.8.1991, in which the deceased by name Shivakumar is stated to have openly crticized the Muslims, as a result of which accused 1 to 9 between 2.30 p.m. and 3.30 p.m. on 1.9.1991 met in the house of A.6 and hatched a conspiracy to kill Shivakumar. According to the prosecution, pursuant to the conspiracy so hatched, A.1 to A.5 forming themselves into members of an unlawful assembly on 5.9.1991 at about 7.45 a.m. fatally attacked Shivakumar and therefore punishable as referred to earlier. In the course of the same transaction, A.1 is stated to have caused an injury on P.W.1, the police constable, who was on duty and therefore punishable under Section 332 I.P.C. In proof of their case, the prosecution examined P.Ws.1 to 29 besides marking Exs.P.1 to P.48 and M.Os.1 to 23. The defence did not let in any oral evidence. But however they marked two exhibits as Exs.D.1 and D.2, the former being the remand report for A.6 and the latter one, a pamphlet containing the handwriting of A.4.

4. There are two sets of evidence available in this case. P.Ws.3 and 4 have been examined to speak about the conspiracy stated to have been hatched by the accused on 1.9.1991. P.Ws.1 and 2 have been examined to prove the actual occurrence proper. In addition to the above, P.W.12 had also been examined to throw some light on the conspiracy aspect and the occurrence proper. Therefore we have decided to state in detail, their evidence alone, the appreciation of which may have a real bearing in this case. P.W.1 during the relevant time was a Grade-I Police Constable in B.2 Police Station – it being in R.S.Puram, Coimbatore. On the occurrence day he was assigned duty in Sukkiravarpet Junction in Rangaiya Gowda Street. It was around 7.45 a.m. From the east towards west in the Mill Road, six persons, each armed with knife, were chasing a person by name Shiva alias Shivakumar affiliated to R.S.S. Party. Just opposite to

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Godawari Textiles, Shiva tumbled on his feet and fell down. At that stage, Shiva was overpowered by those chasing him and they indiscriminately stabbed him on his chest with the weapons, which they had in their hand. While they were so acting they were declaring that with that attack, Shiva must go. In that mob of six except the absconding accused (whose name is Mujbur Rahman) the rest of the accused are present in court. When the five accused present in Court and the absconding accused were attacking, Shiva was trying to thwart the attack by his hands. But however he fell down. Shiva received injuries on his hands. A.1 sitting on Shiva stabbed on his face repeatedly. A.3 also sitting on Shiva stabbed him on various parts of his body. P.W.1 shouted at the accused and tried to snatch the weapon from A.1's hand. At that time A.1 by stabbing, caused an injury on the right hand palm of P.W.1, resulting in a bleeding injury. All the accused tried to escape from the crime scene. At that time P.W.2 came running towards the crime scene and shouted. All the accused made good their escape. Bleeding Shiva was put in an Autorickshaw along with P.W.2 and sent to the Government Medical College Hospital at Coimbatore. P.W.1 making use of the telephone available in a nearby shop (stated to be P.W.17's shop) made a call to the Police Control Room. Then P.W.1 proceeded to the hospital with the knife in his hand. The occurrence was at around 7.45 a.m. P.W.1 reached the hospital at 8.05 a.m. where he was informed by the Doctor in the hospital that Shiva alias Shivakumar is already dead. P.W.1 was highly disturbed. He proceeded to the investigating police station where P.W.28, the Sub Inspector of Police was present. P.W.28 reduced into writing the narration of P.W.1. P.W.1 read that complaint and then signed in it. Ex.P.1 is the said complaint. P.W.1 produced the weapon which he snatched from A.1 at the police station, which was recovered under form 95/Ex.P.2. M.O.1 is the knife. P.W.1 was sent to the hospital with a police medical memo, where he took treatment as an out patient. During inquest P.W.1 was examined. P.W.1 identified in the Central Prison A.1 and A.3. In the test identification parade conducted by the Judicial Magistrate on 6.2.1992; (P.W.1 actually identified only A.3 and the absconding accused and it may be noted even here itself that in the test identification parade A.1 was not put up for identification). Another test identification parade was conducted by the Judicial Magistrate, in which P.W.1 identified A.4. P.W.1 also identified A.7 and A.9 in court as the persons, who were involved in the occurrence proper. He added that on the occurrence day except the accused mentioned by him in Court and the absconding accused, no other accused were there. All the accused had long knives in their hands.

5. P.W.26 was the Sub Inspector of Police during the relevant time in the Control Room. He was on duty from 8.00 p.m. on 4.9.1991 till 8.00 a.m. on 5.9.1991. At 7.45 a.m. on 5.9.1991 when P.W.26 was in the control room, a police constable having No.896 (there is no dispute that it is P.W.1) made a call, which originated from a telephone having indicator No.49124 stating that in Sukkiravarpet Junction, a person had been killed and as there was a huge crowd, a police van must be sent. P.W.26 through the Very High Frequency mike informed Police Patrol Vehicle No.21 of B.2

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Police Station and they also sent a section of police personnel. P.W.26 came to know later on that a crime bearing Crime No.1026 of 1991 under Section 302 I.P.C. had come to be registered on the file of the investigating police station. P.W.28 is the Sub Inspector of Police in the investigating police station. At 8.30 a.m. on 5.9.1991, P.W.1 - a traffic constable attached to B.2 Police Station appeared before him and narrated the complaint, which he reduced into writing; read it over to him and then took his signature in it. He registered that complaint as Ex.P.1 in his police station Crime No.1026 of 1991 under Section 302 I.P.C. Ex.P.40 is the Printed First Information Report prepared by him. He also recovered M.O.1 produced by P.W.1 at that time under Ex.P.2. Then P.W.1 was sent to the Government Hospital with a medical memo for treatment. P.W.29 is the investigating officer. At 9.05 a.m. on 5.9.1991 P.W.28 handed over the Express Records to him. Immediately he commenced the investigation. He reached the scene of occurrence at 9.20 a.m. and in the presence of P.W.11 and another, he prepared Ex.P.7, the Observation Mahazar and Ex.P.41, the rough sketch. He caused the crime scene to be photographed from different angles. At 10.35 a.m. from the crime scene he recovered blood stains; blood stained earth; sample earth; a pair of yellow colour hawai slipper; another yellow colour left foot hawai slipper; a blue colour hawai slipper and another blue colour hawai slipper all round the occurrence place. They were all recovered in the presence of P.W.11 and another under Ex.P.8. P.W.11 witnessed the preparation of the various records as well as the recoveries namely, M.Os.4 to 11, as spoken to by the investigating officer. P.W.29 conducted inquest over the dead body in the hospital from 11.30 a.m. till 1.30 p.m. in the presence of Panchayatdars and witnesses. Ex.P.42 is the inquest report. During inquest, he examined P.Ws.1,2,3,4,6 and 8 and recorded their statements. Then he sent a requisition to the Government hospital for conducting post-mortem.

6. P.W.24 is the Police Constable, who carried the requisition for post-mortem to the hospital. He was present throughout post-mortem. After post-mortem he removed the personal wearing apparels from the dead body and handed over the same to the investigating officer. P.W.19 is the professor of Medicine in the Government Medical College Hospital at Coimbatore. On receipt of the requisition, he did post-mortem on the dead body on 5.9.1991. During post-mortem he found various symptoms as noted by him in Ex.P.24, the post-mortem report. The symptoms noted by him are as hereunder:-

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> "External Appearances:-
>
> Dried blood stain seen on the left side neck, left upper arm, left chest, left abdomen, left thigh, right cheek, right upper arm, right thigh, entire back and both sides back of the thighs.
>
> 1. A transverse out wound 3 x 2 cm muscle deep situated on the left side neck 8 cm below the pinna of the left ear.

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2. A transverse cut wound 4 x 2 cm bone deep situated on the left shoulder.

3. An oblique cut wound 5 x 2cm muscle deep situated on the outer aspect of the elbow region.

4. An oblique cut wound 2 x 1 cm muscle deep situated on the inner aspect of middle third of the left fore-arm 5 cms below wound No.3.

5. A transverse cut wound 5 x 2 cm muscle deep situated on the lower third of the left fore-arm 10 cm below wound No.3.

6. An oblique cut wound 7 x 2 cm bone deep situated on the lower third of the left forearm 2 cm below wound No.5.

7. A transverse cut wound 3 x 2 cm muscle deep situated on the lower third of the left fore-arm 4 cm below wound No.5.

8. A transverse cut wound 5 x 2 cm muscle deed situated on the middle third of the left thigh 14 cm above the left knee joint.

9. A transverse cut wound 2 x 2 cm muscle deep situated on the right upper arm 9 cm below the Right shoulder joint.

10. An oblique cut wound 6 x 2 cm muscle deep situated on the right forearm 9 cm below the right elbow joint.

11. An oblique cut wound 3 x 2 cm muscle deep situated on the lower third of the right forearm, 4 cm above the right wrist joint.

12. A transverse cut wound 4 x 2 cm bone deep situated on the right side axillary region 13 cms outer to the right nipple.

13. An oblique cut wound 3 x 2 cms muscle deep situated on the outer aspect of the right scapular region.

14. A transverse cut wound 2 x 2 cm muscle deep situated on the upper part of the right scapular region.

15. An oblique cut wound 3 x 2 cm muscle deep situated on the right inter scapular region.

16. An oblique stab wound 3 x 2 cms cavity deep situated on the right interscapular region 1 cm outer to wound No.15.

17. An oblique stab wound 3 x 2 cms cavity deep situated on the left back 7th intercostal space 1 cm outer to midline.

18. A transverse cut wound 5 x 2 cm muscle deep situated on the left back 8th intercostal space 1 cm below wound No.17.

19. A transverse cut wound 3 x 1 cm muscle deep situated on the outer aspect of the left scapular region 5th intercostal space. All the above wounds 1 to 19 have regular margins and everted. Blood oozing from all the above wound.

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20. An oval shaped abrasion of 3 x 1 cm skin deep, situated on the left cheek.

21. A linear abrasion 10 x 1 cms skin deep with tappering down seen over the left shoulder to left upper arm outer aspect.

22. An oval shaped abrasion 2 x 1 cm skin deep situated on the back of the left elbow.

23. An oval shaped abrasion 3 x 1 cm skin deep situated on the inner aspect of the elbow joint.

24. A linear abrasion of 6 x 1 cm skin deep situated on 5 to 7th left intercostal space of the chest 3 cm away from the midline.

25. An oval shaped abrasion 3 x 1 cm skin deep situated on the right ankle joint. All the absrasions are covered with dried blood. All the teeth present. Eyes, ears and genitals are normal. Finger nails pale. No discharge via nostrils; mouth and urethar.

Internal Appearances:-

Dissection of wound No.16 extends obliquely downwards to the right Thoracic Cavity. Right side 6th rib fractured. Right Thoracic cavity contains 300 ml of fluid blood. Right lung pale. Dissection of wound No.17 extends obliquely downwards piercing the left lower lobe of lung 3 x 1 cm and 2 cm depth. Blood oozing left Thoracic cavity contains 900 ml of fluid blood. Left lung pale. Heart – Both chambers empty. No lesion. Liver, Spleen, Kidneys are pale. Stomach contains 10 ml of turbid fluid. N odour. Mucosa pale. Intestine empty. Urinary Bladder:Empty.Skull bone, Hyoid Bone Intact. Brain – Pale. Viscera and blood preserved for chemical analysis."

Ex.P.25 is his final opinion. The Doctor opined that death would have occurred due to cumulative effects of multiple injuries. The viscera was preserved by P.W.19 for examination. He would depose that the injuries found on the dead body could have been caused by long knives and Aruvals. Injury Nos.16 and 17 with corresponding internal injuries would cause death instantaneously.

P.W.18 is the Medical Officer in the Government Medical College Hospital, Coimbatore. At 8.05 a.m. on 5.9.1991 Shivakumar, son of Kuppusamy aged about 26 years was brought before him by his friend Prabhakar and Senthil Kumar, who is the brother of said Shivakumar for injuries shown to have been sustained by Shivakumar. P.W.18 examined Shivakumar and found him dead. P.W.18 enquired the persons, who brought Shivakumar to the hospital and they answered that three known persons and three unknown persons at about 7.45 a.m. on that day in Sukkiravarpet attacked Shivakumar with Aruvals. P.W.18 examined Shivakumar and found on

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him various symptoms as noted by him in Ex.P.23, the Accident Register. P.W.18 consigned the dead body of Shivakumar to the mortuary. The symptoms noted by him are as hereunder:-

"External Injuries:-

1.Eliptical stab injury left shoulder 4 x 2 cm.
2. Stab injury left shoulder 5 x 2 cm.
3. 5 eliptical stab wounds over the back and front of left forearm measuring 3 x 2 cm each.
4. Stab wound 5 x 3 cm over left thigh.
5. Two stab wounds right shoulder 2 x 2 cm each.
6. 2 stab wounds over right forearm 2 x 3 cm each.
7. Stab wound over left wrist 2 x 2 cm.
8. 6 eliptical stab wounds over back each measuring about 2 x 2 cm.
9. 3 x 2 cm cut wound 4" below left ear.
10. A transverse cut wound 12 cm over right axilla.
In addition to multiple abrasions at various places over the body are seen."

7. P.W.29 continued his investigation further by examining witnesses and recording their statements. He recovered M.Os.21 to 23 removed from the dead body after post-mortem by the constable, who was present throughout post-mortem and produced before him, under form 95/Ex.P.44. On information furnished to him by the police constable at 5.00 p.m. on 6.9.1991 he arrested A.6 and A.7 and brought them to the police station. Then A.6 and A.7 were sent for judicial remand by P.W.29. On 7.9.1991 P.W.29 examined further witnesses by recording their statements. On 10.9.1991 he gave a requisition to the Court to examine P.Ws.3 and 4 under Section 164 of the Code of Criminal Procedure. P.W.29 examined further witnesses and recorded their statements. P.W.29 received an intimation that A.1 and A.2 have surrendered before Judicial Magistrate No.II, Trichy on 13.9.1991. On 26.9.1991 he filed an application before the Chief Judicial Magistrate to take A.1 and A.2 into police custody. Ex.P.45 is the affidavit and petition filed by him in regard thereto. At 5.30 p.m. on 26.9.1991 he took A.1 and A.2 into police custody pursuant to Court's order and brought them to the police station. At 5.30 a.m. on 27.9.1991 he examined A.1 in the presence of P.W.21 and another. A.1 gave a voluntary confession statement at that time, the admissible portion of which is Ex.P.29. Pursuant to Ex.P.29, M.Os.15 and 16 came to be recovered under Ex.P.31. At 7.15 a.m. P.W.29 examined A.2 in the presence of the same witnesses and he also gave a voluntary confession statement, the admissible portion of which is Ex.P.30. Pursuant to Ex.P.30, M.Os.17 to 19 came to be recovered under Ex.P.32. A.1, A.2 and the recovered incriminating objects were brought to the police station. P.W.21 witnessed the examination of A.1 and A.2 by P.W.29 in police custody; recording of their confession statements and recovery of the various incriminating objects as already spoken to by P.W.29. P.W.21 also witnessed P.W.29

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lifting the finger prints and foot prints of A.1 and A.2. Ex.P.33 is the foot prints of A.1 while Ex.P.34 is the foot prints of A.2. P.W.29 after bringing A.1 and A.2 into police custody made A.1 to rewrite the handwritten material already found written on the wall (FATWA) in three white sheets , a number of times in the presence of P.Ws.21 and another. He also made A.1 to write in a white paper, the numerical from 1 to 9 seven times. Ex.P.46 is the said record. Likewise A.2 was asked to write and Ex.P.47 is the record in regard thereto. P.W.29 lifted the finger prints and foot prints of A.1 and A.2 with the help of a handwriting expert. Then A.1 and A.2 were re-surrendered in Court for continuation of their judicial remand.

8. On 1.10.1991 P.W.29 came to know that the absconding accused Mujbur Rahman and A.3 have surrendered in the Magistrate's Court at Coimbatore on 17.9.2001 and received an intimation in regard there to. P.W.29 sent a requisition to the court to conduct the test identification parade to enable P.Ws.1 to 4 to identify the assailants. At 12.00 noon on 6.10.1991 in the presence of P.W.20 and another, P.W.29 arrested A.5 and examined him. At that time A.5 gave a voluntary confession statement, the admissible portion of which is Ex.P.26, pursuant to which M.Os.12 to 14 came to be recovered under Ex.P.27 attested by the same witnesses. A.5 was brought to the police station and in two white papers, his foot prints and finger prints were lifted. P.W.20 witnessed the arrest of A.5; his examination; recording his confessions statement leading to the recovery and lifting his foot prints and finger prints as spoken to by P.W.29. The foot prints of A.5 is Ex.P.28. A.5 was sent for judicial remand. All the case properties so recovered were also sent to the court with a requisition to subject the same for chemical examination. At 6.15 p.m. on 21.10.1991 P.W.29 arrested A.8 just opposite to his house. He was brought to the police station at 7.00 p.m. and then sent for judicial remand. By giving a requisition to the judicial authorities through the Deputy Commissioner of Police, he examined the absconding accused Mujbur Rahman and A.3. At 12.30 p.m. on that day, the absconding accused gave a voluntary confession statement, the admissible portion of which is Ex.P.35, pursuant to which a knife had been recovered under Ex.P.37. However the knife had not been exhibited. A.3 was examined at 3.00 p.m. in the presence of P.W.22 and another. At that time A.3 gave a voluntary confession statement, the admissible portion of which is Ex.P.36, pursuant to which M.O.20 came to be recovered under Ex.P.38. P.W.25 witnessed the examination of the absconding accused Mujbur Rahman and A.3 and recording their confession statements. P.W.23 witnessed the recovery of the weapon under Ex.P.37 pursuant to the confession statement given by Mujbur Rahman, the absconding accused. P.W.23 also witnessed the recovery of M.O.20 at the instance of A.3 under Ex.P.38. P.W.22 is the jailor during the relevant time in the prison at Coimbatore. On 22.10.1991 P.W.29 the investigating officer appeared and gave a requisition disclosing that he wants to examine two remand prisoners. Their names are Mujbur Rahman (the absconding accused) and Oomai Babu (A.3). In the presence of P.W.22, both the accused were examined. Exs.P.35 and 36 are the confession statements

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of the absconding accused and A.3 and P.W.22 admits his signature in those confession statements. The incriminating objects recovered as referred to above were sent to the Court on 23.10.1991 by P.W.29 with a requisition to subject the same for chemical examination. On 21.1.1992, P.W.29 came to know that A.4 had surrendered before Judicial Magistrate No.III,Coimbatore. P.W.29 gave a requisition on 29.1.1992 to the Court to conduct a test identification parade to identify A.4.

9. P.W.2 is the younger brother of the deceased and he was studying in P.S.G. Arts College during the relevant time. The deceased was having a vegetable shop in Saibaba Colony. The deceased was associating himself strongly in R.S.S. movement. In the general election, the deceased was working for Bharathiya Janatha Party. There was a public meeting on the R.S.S. movement on 30.8.1991 in which the deceased participated. The deceased spoke in the meeting criticising Muslims and bringing disrepute to them. The whole family was feeling so bad as to why the deceased was talking so badly about the Muslims. Fifteen days prior to that meeting there were hand written materials in prominent places in the wall. Those materials disclosed the names of ten persons including the name of the deceased as persons belonging to Hindu Movement, stating that they would be killed in ten days. Those hand written materials and posters were found prominently displayed in Sowdamman Temple lane and Oppanakara Street. On that prominent display, the leader of Bharathiya Janata Party Arjun Sampath gave a complaint to the police. Arjun Sampath was examined as P.W.5. On the occurrence day at about 7.15 a.m. the deceased left the house to his vegetable shop at Saibaba Colony. Half an hour later, a relative by name Rangarajan informed him that Shiva is being chased by some Muslims. P.W.2 was almost ready to go the College. Leaving the books down he ran towards Rangaiya Gowda Street and in the intersection of Mill Road and Rangaiya Gowda Street, when he turned, he found his brother being hacked to death near Godawari Textiles by A.1 and A.3. Besides A.1 and A.3, A.2 and three known persons were also there with blood stained knives. Those persons commanded others to come quickly. A.1 was commanding them to leave immediately. P.W.1, came there, when he attempted to snatch the weapon from A.1, A.1 stabbed him, resulting in a bleeding injury to P.W.1. Crowd gathered. Shiva was fighting for his life. He was having profusely bleeding injuries all over his body. P.W.1 brought an Autorickshaw in which P.W.2 and his mother (not examined) took Shiva to the Government Hospital at Coimbatore, where the Doctor pronounced his brother dead. On enquiry by P.W.29, P.W.2 explained what happened. P.W.2 identified A.1 to A.3 correctly in court. P.W.2 had admitted that he cannot identify the remaining accused. However he identified M.O.1 as the weapon in the hands of A.1. P.W.3 during the relevant time was working in the tea shop owned by P.W.4. On 1.9.1991 at about 2.30 p.m. A.6, A.7 and A.8 alighted from a van near P.W.4's shop. All of them entered the house of A.6. Half an hour later A.8 came to the tea shop and ordered ten cups of tea to be brought to the house of A.6. P.W.3 carried the tea from the shop of P.W.4 to A.6's house where he supplied tea to everybody there. In all there were ten persons including A.6, A.7 and A.8. The accused present

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in court were there. P.W.3 was waiting there to take the glasses back. At that time he heard A.6 declaring that whatever may be the expenditure, the terms of FATWA must be accomplished within ten days by finishing off Shiva. P.W.3 also heard A.8 saying that they should not retreat from the step which they have already taken and therefore Shiva must be finished off first. Immediately A.7 said that A.1 is the proper person to do that and in fact A.7 even touched A.1 to identify him. At that time the conspirators noticing the presence of P.W.3 asked him to leave the place immediately. As P.W.3 was leaving, he heard A.6 addressing the conspirators as to whether Shiva would be finished off and all the accused in unison raised their hands and took a vow. P.W.3 informed this to P.W.4, who in turn asked him to leave it as it is, so as to avoid inviting troubles. After sometime P.W.3 went back to the house of A.6 to collect the glasses and a sum of Rs.10/- was given asking P.W.3 to give Rs.8/- towards tea cost and take the balance as his tips. Four days later P.W.3 came to know that Shiva was murdered by A.1 and his associates. P.W.3 went to the Government Hospital where he observed the dead body. The police again enquired him. P.W.3 participated in the test identification parade held on 14.10.1991 and identified A.3 and another. The other person identified by him is not in court.

10. P.W.4 is having a tea shop near Ayyanna Gounder Street. P.W.3 was employed in his tea shop for doing odd jobs. At 2.30 p.m. on 1.9.1991 P.W.4 saw A.6, A.7 and A.8 alighting from a van and then going inside the house of A.6. A.6's house is at a distance of 75 feet from his shop. A little later seven known persons entered the house of A.6. Except one, the remaining persons found at that time are in court. At 3.00 p.m. A.8 came to his shop and ordered for ten cups of tea through P.W.3. P.W.4 sent ten cups of tea through P.W.3. P.W.3 came back to the shop sometime later and disclosed to him what he heard while he was inside the house of A.6. (We have already referred to the conversation heard by P.W.3 while he was inside the house of A.6 and therefore we are not repeating here what P.W.3 told P.W.4). P.W.4 advised P.W.3 that they need not bother about it so as to avoid unnecessary trouble to them. P.W.3 after some time went to the house of A.6 and brought back the glasses. After sometime except A.6 all the others left the house of A.6. On 5.9.1991 P.W.4 came to know that Shiva had been done to death and went to the Government Hospital to observe the dead body. During inquest P.W.4 was examined by P.W.29, to whom he disclosed what he heard as referred to earlier. P.W.4 was also examined by the Judicial Magistrate (obviously under Section 164 of the Code of Criminal Procedure). P.W.4 participated in the test identification parade and identified A.3 and the absconding accused Mujbur Rahman. The absconding accused is not present in court. P.W.4 again participated in the test identification parade held on 6.2.1992 in the prison and identified A.4. P.W.5 was the District Secretary of Bharathia Janatha Party at Coimbatore. He had given a complaint to the investigating police station about the incriminating material found written in the walls in some parts of Coimabtore Town. On 20.8.1991 the investigating police station convened a peace talk and in the said talk from his side there

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were four persons and from Muslims side there were four persons. It was decided that the issue should not be precipitated and if any information comes as to the source of displaying the incriminating materials in the wall, police must be informed. In that context there was a public meeting on 30.8.1991, in which Shiva, since deceased addressed a gathering by stating that in a democratic country, there was a poster saying that ten persons would be killed. He also said that if the persons, who are responsible for pasting those materials, are men of courage, they should do it. On 5.9.1991 Shiva was murdered and P.W.5 came to know that people affiliated to Jihad Committee alone are responsible for the murder. The whole of Coimbatore City was in the grip of fear. Shops had lowered down their shutters. Police examined him. Ex.P.3 is the complaint given by him as referred to earlier and Ex.P.4 is the agreed decision. Exs.P.5 and P.6 are copies of the materials found written on the walls.

11. P.W.6 is the uncle of the deceased. Apart from speaking about the involvement of the deceased in R.S.S.Movement and addressing a public meeting on 30.8.1991 he deposed that he came to know that his nephew was murdered by Muslims. He went to the Hospital where he observed the dead body. He was examined by the police. P.W.7 is an Autorickshaw Driver by profession. On the occurrence day at about 7.00 a.m. he was in the Autorickshaw stand. At about 7.45 a.m.on that day near Godawari Textiles he heard a commotion. At that time P.W.7 was talking with one Kuttappan sitting inside the Autorickshaw. A traffic constable went running towards the scene by shouting followed by a boy. P.W.7 and Kuttappan also ran towards that place, at which point of time he found five or six persons running from the crime scene with knives. P.W.7 saw them only from behind. He saw the knife in the hands of P.W.1, who was standing by the side of the injured. P.W.1 asked P.W.7 to bring the Autorickshaw. At that time another Autorickshaw under the control of one Nazar came. P.W.7 took School going Children in his Autorickshaw. At 11.00 a.m. in the morning he came to know that Shiva died. P.W.8 would state that he is an Autorickshaw driver by profession. He had stationed his Autorickshaw in the Sukkiravarpet Junction on the occurrence day. At about 7.45 a.m. on that day, a boy of an young age and a lady wanted his Autorickshaw to be utilised and he accordingly proceeded to the crime scene with the Autorickshaw. He found a person with bleeding injuries opposite to Godawari Textiles. The boy and his mother had taken that injured in his Autorickshaw to the Government Hospital at Coimbatore. Enroute the boy told his mother that his brother is already dead. As the situation was found to be tense opposite to the hospital, he washed the blood stains in the Autorickshaw from the tap water available opposite to the hospital. He then came back to his Auto stand. But however he found that the city was under the grip of fear and therefore he went to his house with the Autorickshaw. P.W.9 is the photographer, who photographed the crime scene from different angles as well as the dead body in the hospital. M.O.2 series and M.O.3 series are the photographs and the negatives. P.W.10 is a Civil Engineer by profession. He was residing in Door No.1187 in Sukkiravarpet during the relevant time. At about 7.45 a.m. on the

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occurrence day when he was about to get ready to go to his office he heard a commotion outside. He came out to find a person lying in a pool of blood opposite to Godawari Textiles. There was a huge crowd. P.W.10 enquired and some one informed him about the crime. As all the shops closed down their shutters, he did not go to office. P.W.12 is having a mobile laundry, which he used to take around Oppanakara Street etc,. for the purpose of ironing clothes. On 4.9.1991 when he was moving in Oppanakara Street, he found near Vinayagar Temple some posters affixed in the wall that Shiva (the deceased in this case) and some other named individuals must be killed. It was around 12.00 noon on that day. At 6.00 p.m. on the same day when he was returning home, near a hardware shop in that road, he saw A.1, A.6 and A.7 coming out of the hardware shop and at that time A.6 handing over money to A.1 and asking him to accomplish the event carefully. On 5.9.1991 when he was in Oppanakara Street moving with his mobile laundry he found ahead of him people running helter-skelter. P.W.12 asked a few as to what it is about and they informed that one Shiva had been killed. P.W.12 was in the Mill Road at that time. A little later four accused passed him from the opposite direction and they were armed. It was about 7.30 a.m. A.1 had a blood stained knife and his shirt was also blood stained. The knives in the hands of the other accused were also blood stained. P.W.12 identified A.1 in Court. As the other three persons were running with their face down P.W.12 could not correctly identify them. Movement of vehicles in that area came to a standstill and the shop owners lowered down their shutters.

12. P.W.13 is the duty Medical Officer in the Government Medical College Hospital at Coimbatore. At 11.30 a.m. on 5.9.1991, P.W.1 appeared before him for injuries shown to have been sustained by him at 7.45 a.m. in Sukkiravarpet - Rangaiya Gowda Street Junction at the hands of six known persons by the use of knives and spear. P.W.13 found on P.W.1, 1 cm x ½ cm skin deep cut injury. The injury is simple in nature. P.W.13 would depose that P.W.1 could have received the injury at the time and in the manner alleged. Ex.P.9 is the Accident Register. P.W.14 is the Head Quarters Deputy Tahsildar at Coimbatore North. On 5.9.1991 he came to know that a Hindu by name Shiva was murdered by the people having faith in Islam, and as a result of that, shops here and there in Coimbatore City were closed and buses were damaged. Therefore the situation was tense. Police Bandobast was provided for all the areas. Routine life was affected. Movement of the public in the road was almost nil. The glass windows in buses were broken. The entire life in Coimbatore had come to a standstill. P.W.15 is the Magisterial Clerk, who speaks about the receipt of the case properties along with Ex.P.10, the requisition and sending the same to the laboratory. Exs.P.11 to P.13 are the respective reports received from the laboratory. P.W.16 during the relevant time was Judicial Magistrate No.III, Coimbatore. Ex.P.14 is the requisition given by the Inspector of Police to the Chief Judicial Magistrate to conduct the test identification parade for identifying Mujbur Rahman, the absconding accused, A.3 and others. The Chief Judicial Magistrate at the foot of the requisition made an endorsement forwarding it to Judicial Magistrate

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No.III, Coimbatore for necessary action. Accordingly P.W.16 conducted the test identification parade on 14.10.1991 after issuing Ex.P.15 the intimation to the prison. P.W.16 took all precautions before conducting the test identification parade. P.Ws.1,3 and 4 were present in the prison. P.W.2 was not present. After completing all the legal formalities, P.W.16 made both the accused referred to above stand along with others, who are similarly looking and allowed the witnesses to identify them. He had taken the precaution of not allowing the presence of the police officials when the identification parade goes on. He also ensured that no other persons were also available in the vicinity. P.W.1 identified the absconding accused Mujbur Rahman and A.3 on both the occasions. Then P.W.3 was asked to identify by rearranging the position of the arrested accused. P.W.3 identified the absconding accused and A.3 correctly on both the occasions. P.W.4 likewise identified both the above referred to accused correctly on both the occasions. After the parade P.W.16 asked the identifying witnesses as to whether they have seen the suspects earlier and they answered in the negative and affirmed that they saw them for the first time only in the prison. A similar question was put to the suspected accused, for which the absconding accused answered that he was photographed by the police and the police have shown him to several persons. A.3 in his turn answered that he was shown to various persons outside the prison. The test identification parade was commenced at 4.45 p.m. and completed at 5.10 p.m. Ex.P.16 is the proceedings drawn by P.W.16 in regard thereto. P.W.29 gave a requisition namely, Ex.P.17 on 29.1.2002 to conduct another test identification parade. Pursuant to the endorsement made by the Chief Judicial Magistrate forwarding it to P.W.16 to conduct another test identification parade, P.W.16 conducted the test identification parade on 6.2.1992 after sending intimation to the prison namely, Ex.P.18. P.Ws.1 and 4 participated in the test identification parade. The test identification parade was conducted to enable the witnesses to identify the suspect namely, A.4. Choosing persons similar to the physical stature of A.4 P.W.16 made A.4 stand in a line consisting of ten persons. Similar precautions which P.W.16 had taken while conducting the first test identification parade had been taken by him in the present instance also. P.W.1 identified A.4 correctly on both the occasions. Likewise P.W.4 also identified the suspect namely, A.4 correctly on both the occasions. Then P.W.16 questioned the accused/A.4 as to whether he has to say anything on the parade conducted. A.4 answered that when he was taken to the Court, the witnesses had seen him. Ex.P.19 is the proceedings drawn by P.W.16 in regard thereto. P.W.16 pursuant to Ex.P.20, the requisition, directed the witnesses to be produced before him on 24.9.1991 for examination under Section 164 of the Code of Criminal Procedure. Accordingly he examined P.W.3 and Ex.P.21 is his statement. Likewise he examined P.W.3 and recorded his statement. Ex.P.22 is his statement.

13. P.W.17 is a resident of Premises No.155, Sukkiravarpet. He is a pawn broker by profession. His house and pawn shop are in Sukkiravarpet. At 7.45 a.m. on 5.9.1991, a policeman came to his house and wanted to make

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use of his telephone to talk to the police control room. Accordingly the said policeman made a call to the control room from the telephone with indicator No.44124 available in his house. P.W.27 was on bandobust duty when there was a public meeting on 30.8.1991 held by Bharathiya Janatha Party. Several people including Shiva, since deceased, spoke in that meeting. In his speech, Shiva took exception to the posters affixed (we have already referred to the contents of the posters in the earlier portion of this judgment). P.W.27 took down the speech of Shiva and Ex.P.39 is his noting on the speech of Shiva which he gave it to the investigating officer. P.W.29 examined further witnesses by recording their statements. The absconding accused could not be secured at all. After completing all the legal formalities, P.W.29 filed the final report in court against the accused on 25.11.1992 under Sections 147, 148, 324, 302 read with 120-B, 109, 149 and 332 I.P.C. When the accused were questioned under Section 313 of the Code of Criminal Procedure, on the basis of the incriminating materials made available against each one of them, they denied each and every circumstance put up against them as false and contrary to facts. No oral evidence was let in on their side. But however two documents were marked on their side namely, Ex.D.1, the remand report for remanding A.6 and A.7 and Ex.D.2 the sample handwriting of A.4.

14. Mr.John Sathyan, learned counsel appearing for A.1, A.2, A.4, A.7 and A.8 contended that from the evidence of P.W.1 it is possible to eliminate P.W.2 as an eye witness to the occurrence proper. If it is so, P.W.1 alone is available as an eye witness to the occurrence proper. P.W.1's presence as an eye witness to the crime can be doubted for the following reasons:-

> "The injury shown to have been sustained by P.W.1 during the occurrence, could not have been caused during the occurrence and the medical evidence shows that it may be self inflicted. There is a grave doubt from where P.W.1 had contacted the control room. P.W.26 would state that the control room received a call from P.W.1 from the telephone having indicator No.49124 whereas P.W.17 would state that P.W.1 is shown to have used to contact the control room having the telephone with indicator No.44124. What exactly is the message conveyed to P.W.26 during that call appears to be at variance from the evidence of P.W.1 and the evidence of P.W.26. The evidence of P.W.26 would mean that P.W.1 was reporting only about the occurrence that had already taken place, but however P.W.1's evidence shows that the message is that he is a witness to the occurrence. This is a very serious matter to doubt P.W.1's evidence. If P.W.1 claims that he was on duty, and when the accused are disputing his presence on duty at that place, a duty is cast upon the prosecution to establish the presence of P.W.1 on duty at the crime scene with necessary records, which they have not produced. The conduct of P.W.1 in not lodging the

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complaint forthwith at the police station and instead going to the hospital first, definitely throws considerable doubt about the presence of P.W.1. P.W.1 is not an ordinary person and he is a police constable. P.W.1 admits that the investigating police station (B.1) and the police station (B.2) are 100 feet away from either side of the crime scene. Therefore when P.W.1 had not chosen to go to the police station forthwith to report the crime, this court has to suspect that P.W.1 is a planted witness to speak to the prosecution case. In Ex.P.23 the Accident Register issued for the deceased it was originally written that the occurrence took place at about 6.45 a.m. and later on corrected as 7.45 a.m. P.W.18, the Doctor, who had issued Ex.P.23 admits such a correction. In the face of the above correction in Ex.P.23, this court can easily hold that the occurrence could not have taken place at 7.45 a.m. The evidence of P.W.2 is that as his elder brother (the deceased) was returning from the public toilet, the occurrence had taken place. So, reading the evidence of P.W.2 as a whole and the evidence of P.W.18 the Doctor coupled with Ex.P.23, the Accident Register with the correction referred to above, this court can safely conclude that the occurrence could not have taken place at 7.45 a.m. but very much earlier and if that is so, P.W.2 could not be an eye witness at all. P.W.1's evidence also shows that only after the event P.W.2 came running to the crime scene and therefore this court can easily doubt the presence of P.W.1 at the crime scene as an eye witness. Non recovery of the blood stained cloth from P.W.1 would add credibility to the defence that P.W.1 could not have been present at the crime scene. Foot prints of A.1, A.2 and A.5 have been taken during investigation to compare them with the foot prints stated to be available on M.Os.6 to 11 - blood stained slippers stated to have been recovered from the crime scene. But however they were not subjected to any expert's examination. This falsifies the prosecution case of the involvement of the accused put up for trial. Sample handwriting and signatures taken from the accused were compared with the written material namely, Ex.P.5 and the report is that the admitted signatures do not tally with the disputed signatures/writings. This again makes a dent in the prosecution case. Ex.P.39, the speech of Shiva taken down by P.W.27 is not directed against Muslims alone, but it is a general criticism against all. Therefore there is no reason at all as to why Muslims should take the contents of those speech as directed against them to commit the crime."

Mr.N.Manokaran, learned counsel appearing for A.3 and A.5 would submit that as far as A.5 is concerned there is absolutely no legal evidence to connect him to the conspiracy. P.Ws.3 and 4 did not identify A.5 as the

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person found in the house of A.6 when the conspiracy is stated to have been hatched. A.5 had been acquitted of the offence under Sections 148 and 302 I.P.C. Therefore the conviction of A.5 under Section 120B of the Indian Penal Code cannot be legally sustained. As far as A.3's involvement is concerned, learned counsel would contend, by taking us through the evidence of P.Ws.1 to 4, that A.3's involvement is not established at all. The recovery of M.O.20 stated to have been made at the instance of A.3 that too, when he was in police custody had definitely taken place beyond the period of fifteen days from the date of the initial remand and therefore the recovery evidence cannot be used against A.3. Learned counsel also took enormous pains to convince us that the evidence of P.Ws.1 to 4 neither establishes the conspiracy nor the occurrence proper. Mr.John Sathyan and Mr.N.Manokaran, learned counsel appearing for the above referred to accused also would criticize the evidence of P.W.12 as most unreliable evidence. His evidence, according to the learned counsel, is so very artificial that no court of ordinary prudence and conscience would act upon it. Mr.Purushothaman, learned counsel appearing for A.9, after adopting the arguments advanced by the learned counsel referred to earlier, would also state that there is absolutely no legal evidence to connect the accused namely, A.9 with the charge of conspiracy. P.W.1's evidence that A.9 was present at the occurrence proper would have no legs to stand, since none of the other witnesses speak about his presence at the crime scene. A.9 is charged only under Section 120B I.P.C. and not under other sections. On the evidence of P.W.1, if this Court has to consider the involvement of A.9 in the murder incident, it would cause considerable prejudice to him for want of specific charge against him on that count. Mr.AR.L. Sundaresan, learned Senior counsel appearing for A.6 took us through the evidence of P.Ws.3 and 4 in extenso. He brought to our notice from the evidence of P.W.29 that there is a possibility that A.6 might have been canvassing his candidature in the general assembly election for Vaniyambadi constituency. P.W.3 is an unreliable witness for more than one reason. According to P.W.3, he joined the services of P.W.4 just on the day when the conspiracy was hatched and left the shop on the day when the murder was committed. According to P.W.3 he had gone to the house of A.6 only once whereas P.W.4 in his evidence would state that P.W.3 was working with him for five or six months prior to the occurrence and that he had sent P.W.3 to the house of A.6 on innumerable occasions. Going by the evidence of P.W.3, learned Senior Counsel would contend that since conspiracy is always hatched in secrecy, it is not possible to believe P.W.3 that he stood by the side of the conspirators and heard it. The involvement of A.6 at the stage of conspiracy is not satisfactorily established and A.6 being the leader of a political outfit the police has falsely implicated him. Mr.AR.L.Sundaresan, learned Senior Counsel would also bring to our attention Ex.D.1, the remand report in which it is disclosed that P.W.1 reported the crime to P.W.27 at 9.00 a.m. on 5.9.1991. But the evidence on record is that the said report was made at 8.30 a.m. Therefore this once again falsifies the prosecution case namely, the presence of P.W.1 at the crime scene at 7.45 a.m; going to the hospital at 8.05 a.m. and then

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reporting the crime at 8.30 a.m.

15. Mr.N.R.Elango, learned Additional Public Prosecutor in meeting these points would state that the complaint Ex.P.1 and the printed First Information Report Ex.P.40 reached the court at 12.40 p.m. on the date of occurrence itself. During inquest P.Ws.1 to 4 were examined and their disclosure revealed not only the conspiracy hatched but also the actual occurrence proper. The inquest report had reached the court on the succeeding day. Therefore the above referred to undisputed facts adds credibility to the prosecution case. Learned Additional Public Prosecutor would submit that A.1's name is not only mentioned in the complaint, but also in the statements of P.Ws.1 and 2 recorded during investigation. Even during inquest A.2's name came to light through the mouth of P.W.2; A.4's name has come through the mouth of P.W.1; A.3's name has come through the mouth of P.Ws.1 and 2 and the names of A.6 to A.8 have come through the mouth of P.Ws.3 and 4. P.Ws.1 and 2 have identified A.3 not only in the Test Identification Parade held on 14.10.1991 but also in Court. Likewise P.W.1 identified A.4 not only in the Test Identification Parade held on 6.2.1992 but also in Court. P.Ws.3 and 4 also identified A.5 in Court. M.Os.13 and 14, namely, pant and shirt, recovered at the instance of A.5 pursuant to Ex.P.26, the admissible portion of his confession statement under a Mahazar Ex.P.27, were found to contain human blood of "O" Group tallying with that of the deceased. Therefore though there can be no material directly to connect A.5 with the conspiracy hatched, yet, from the recovery of Pant and Shirt containing the same blood group as that of the deceased, it is seen that A.5 had definitely done an act in accomplishing the conspiracy hatched. This would be sufficient to hold that A.5 is guilty under Section 120B I.P.C. In answering these points raised by the learned Additional Public Prosecutor, Mr.AR.L.Sundaresan, learned Senior Counsel would contend, if really the inquest report and the statement of witnesses recorded during inquest were ready by 1.30 p.m. on 5.9.1991 itself, there is no reason at all as to why the said inquest report and the statement of witnesses recorded during such inquest, were not sent to Court on the same day. A.6 and A.7 came to be arrested at about 5.00 or 6.00 p.m. on 5.9.1991 and therefore there is every possibility of the police fabricating the case by getting the statement of witnesses recorded during inquest to suit their case and that is the reason why the inquest report with the statements had been sent to the court only the next day. Therefore the submission is, the fact that the inquest report and the statements have reached the court the next day by itself would mean that the prosecution case is not free from doubts.

16. Having regard to the submissions made by the learned counsel all round, we have gone through the entire materials with utmost care and caution. In our considered opinion, the merits of the prosecution case as far as A.5 and A.9 are concerned shall not retain us any longer than what is actually required. It is not in dispute that A.5 was tried besides the charge under section 120-B I.P.C., under Sections 148 and 302 I.P.C. as

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well. Learned Trial Judge acquitted A.5 of offences under Sections 148 and 302 I.P.C. and that judgment was allowed to become final. Therefore the only surviving charge against A.5 is under Section 120-B I.P.C. According to the prosecution, the conspiracy was hatched between 2.30 p.m. and 3.30 p.m. on 1.9.1991 in the house of A.6. P.Ws.3 and 4 alone have been examined to establish the presence of A.5 as a conspirator at that time. As rightly pointed out by Mr.N. Manokaran, learned counsel appearing for A.3 and A.5 that P.Ws.3 and 4 , who alone have been examined to prove the conspiracy aspect of the prosecution case, have not established the presence of A.5 at the time when the conspiracy was hatched. Learned Additional Public Prosecutor is not in a position to bring out any material from which we could even infer that A.5 was present body and soul at the time when the conspiracy was stated to have been hatched. Conspiracy is nothing but an agreement of mind to commit a crime. Therefore we have no hesitation at all to hold that, the evidence of P.Ws.3 and 4 do not establish the presence of A.5, as a conspirator in the house of A.6 between 2.30 p.m. and 3.30 p.m. On 1.9.1991. Of course a forceful argument is made by the learned Additional Public Prosecutor that on A.5 surrendering, he was taken into police custody and examined and at that time A.5 gave a voluntary confession statement, the admissible portion of which is Ex.P.26. Learned Additional Public Prosecutor took pains to convince us that pursuant to Ex.P.26, M.Os.12 to 14 came to be recovered under Ex.P.27. Out of M.Os.12 to 14, M.Os.13 and 14 namely, pant and Shirt were found to contain human blood of "O" group tallying with the blood group of the deceased. Therefore according to him, pursuant to the conspiracy already hatched, A.5 had done an act in furtherance of the conspiracy so hatched and this would be sufficient to convict him. We carefully applied our mind to the argument advanced by the learned Additional Public Prosecutor to sustain the conviction of A.5 under Section 120-B I.P.C. It is needless to state that a person can be a conspirator and as a conspirator he commits the actual crime. It is also possible that a person need not be a conspirator but pursuant to the conspiracy hatched he may commit the crime. In this case A.5, who was tried directly for the offence of murder, as the member of the unlawful assembly, had been acquitted and that judgment had been allowed to become final. The question therefore is whether from the very recovery, A.5's conviction under Section 120-B can be sustained? The recovery evidence is also before court; A.5 was tried for offences under Sections 148 and 302 I.P.C also and the trial Court did not choose to accept the recovery evidence as an incriminating material against him. As noted earlier the evidence of P.Ws.3 and 4 did not establish the involvement of A.5 as a conspirator. Under these circumstances, we are not inclined to accept the argument advanced by the learned Additional Public Prosecutor that since the objects recovered at the instance of A.5 blood group tallied with the blood group of the deceased were found, it would mean that A.5 had acted only in furtherance of the conspiracy, that had already been hatched. Under these circumstances, we are inclined to set aside the judgment under challenge convicting A.5 under Section 120-B of the Indian Penal Code. Accordingly, C.A.No.1253 of 2003 is allowed. As far as A.9 is concerned ,

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he is definitely on a better footing than A.5. Neither there is evidence to show that he is a conspirator nor he was identified by the witnesses as the person present in A.6's house as a conspirator nor is there any recovery. Though P.W.1 would state that A.9 was present while committing the crime, yet, in the absence of a charge against him either under Section 148 I.P.C. or under Section 302 I.P.C., we have no doubt at all that it would not be possible to convict him for the offence of murder without the charge as referred to above, which would cause grave prejudice to him. Therefore without any hesitation, we set aside the judgment under challenge so far as it relates to the conviction of A.9 under Section 120-B of the Indian Penal Code. Accordingly, A.9 is also acquitted of the said offence and his appeal in C.A.No.291 of 2004 stands allowed. Fine amount, if any paid by A.5 and A.9 for the conviction under Section 120-B I.P.C. would be refunded to them. A.5 is stated to be on bail. Therefore bail bond if any executed by A.5 shall stand terminated forthwith.

17. Let us now examine the prosecution case with reference to A.1 to 4 and 6 to 8. The first facet of the prosecution case is conspiracy. Conspiracy is preceded by certain acts shown to have been done, according to the prosecution, by the people of Muslim religion namely, displaying in prominent places their displeasure against Hindus, which made particular reference to Shiva (since deceased) and others as persons to be done away with. Exs.P.5 and P.6 are the FATWA stated to be the command given by God. This publication was on 19.8.1991. This was followed by a public meeting held on 30.8.1991 under the auspices of Bharathiya Janatha Party. P.W.27 during the relevant time was the Inspector of Police (Special Branch) in the investigating police station. His evidence shows that such a meeting was held on 30.8.1991 in which several people spoke and among them Shiva, since deceased was one. The speech of Shiva centered around the contents of Exs.P.5 and P.6 and according to the prosecution Shiva took that opportunity to condemn the Muslims by stating that in a democratic Country such utterances can never be made. Ex.P.39 is the speech of Shiva taken down by P.W.27 to the best of his ability, which has been ultimately translated into a written version. Before passing on to the next stage, namely, the act of conspiracy, we agree with the submission made by the learned counsel Mr.John Sathyan that the speech of Shiva is not particularly against people belonging to Muslim community alone but it is directed against one and all. Mr.John Sathyan took us through the contents of Ex.P.39 and we do find that the speech of Shiva was not only against people preeching to Islam but against Hindus also. The argument advanced by Mr.John Sathyan on the contents of Ex.P.39 is, if Ex.P.39 is not directed against Muslims alone and if it is general in nature, then there is no rhyme or reason for the Muslims to take up that as a cause to eliminate Shiva. In this context we only want to state that it is not possible to read human mind. The same material may be taken note of as a general accusation against all and some one may read in between the two lines and conclude that it really means only against them. Therefore when both the approach is possible, we are not inclined to accept the argument advanced by Mr.John Sathyan that when the contents of

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Ex.P.39 is not directed particularly against Muslims alone there was no need to hatch a conspiracy. Even otherwise, in our opinion the question whether there were materials which provoked any particular section of people to hatch the conspiracy or not, may not loom large, when there is direct evidence on the conspiracy itself.

18. Having the above principle in our mind, we examined the records. As is not disputed by the learned counsel on either sides, the primary evidence on conspiracy is that of P.Ws.3 and 4. It must be noticed that the occurrence took place on 5.9.1991. P.Ws.3 and 4 and other witnesses have come to be examined commencing from 3.4.2002 onwards. Therefore after almost eleven clear years have elapsed from the date on which the crime was committed, the witnesses came to be examined. Therefore the Court must definitely give some allowance to failing human memories. In this case we cautioned ourselves to state that failing human memories cannot be taken advantage of to defeat the defence, even when such witnesses after a long lapse of time blabber on material aspect of the crime. In other words, when their evidence in court varies from the prosecution case on insignificant matters, then the Court must not take a heavy note of the same in doubting the entire prosecution case. To put it the other way, we say, in our considered opinion, that if the witnesses are unison in speaking about the sum and substance of the crime, then the Court has to find out whether those materials connect the accused with the crime or not. Therefore having these principles also in mind, we proceeded to examine the evidence of P.Ws.3 and 4. Even at the outset we would like to state that P.W.3 had admitted in his evidence that sometime on 1.9.1991 only, he joined P.W.4 for doing odd jobs and he left the job on 5.9.1991 or immediately thereafter. This evidence had come out when he was cross examined by the defence. P.W.3 had also admitted when he was so cross examined, that he visited the house of A.6 only once. As against this evidence of P.W.3 about his tenure with P.W.4 and as to how many times he had visited the house of A.6, we have the evidence of P.W.4, who would state in his evidence in cross that P.W.3 was under his employment for six or seven months prior to the occurrence and that he had sent P.W.3 innumerable times to the house of A.6. In our considered opinion these admissions on the part of P.Ws.3 and 4 on the duration of P.W.3's stay with P.W.4 and how many times P.W.3 had gone to the house of A.6 are so very insignificant, which will not affect the very substratum of the prosecution case namely, the prosecution case on conspiracy. Having concluded so, we went through the evidence of P.Ws.3 and 4 to find our whether they contradict each other on any material piece of evidence touching conspiracy. As rightly contended by the learned counsel appearing for the accused and not disputed by the learned Additional Public Prosecutor for the State P.W.4 did not hear the conspirators conspiring among themselves. P.W.3 is the only person, who heard what the conspirators conspired. We have already referred to in the earlier portion of this judgment what their evidence is. Of course as rightly contended by Mr.AR.L.Sundaresan, learned Senior Counsel conspiracy will be always hatched in secrecy. But sometimes conspirators may also slip. One

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such slip appears to have occurred in this case. P.W.3 is an innocuous boy carrying tea from the tea shop and giving it to those who want it. In the case on hand A.8 had come to the shop of P.W.4 and told P.W.3 to get some tea for them in the house of A.6 and that is how P.W.3 gets entry into the house of A.6. His evidence shows that he had given tea and he was waiting to collect the empty glasses. It is possible for the conspirators to note the presence of this boy even when they began to conspire and in that event, they might have been cautious enough to ask the boy to leave the place. Equally it is possible for the conspirators to just ignore the presence of the innocuous boy, who is working in the tea shop and doing odd jobs and proceed to conspire. Once again it all depends upon the circumstances under which the conspirators are grouped and their state of mind. Under these circumstances, we are not in a position to eliminate the presence of P.W.3 absolutely on the ground that since the conspiracy would always be hatched in secrecy, they could not have dared to hatch the conspiracy in the presence of P.W.3. Under these circumstances, we are inclined to accept the oral evidence of P.W.3 that he heard what the conspirators talked at that time namely, to eliminate Shiva. It is seen from his evidence that the conspirators suddenly awakened and noted the presence of P.W.3 at that time and asked him to move away and accordingly P.W.3 moved away from A.6's house and even at that time he overhears the conspirators expressing their decision in unison by raising their hands that Shiva would be killed. We find that P.W.3 had been cross examined only by A.1 to A.5 and not by A.6 to A.9. When a witness is cross examined by a few of the accused, which may cover that portion of the defence of the remaining accused also, it is open to the remaining accused to cross examine the witnesses once again or to adopt the cross examination already done by other accused, since doing cross examination once again may be over lapping. In his case, we have already referred to the oral evidence of P.W.4, who is very categorical in stating that A.6 to A.8, after alighting from the van entered the house of A.6. P.W.3 also would state in his evidence that in A.6's house he saw A.6, A.7, A.8 and the remaining accused. Therefore in our considered opinion, a duty is cast upon A.6 to A.9 (we have already acquitted A.9) to cross examine these witnesses to dispute their presence in the house of A.6. The house belongs to A.6 and according to the prosecution, conspiracy took place only in his house. Therefore in our considered opinion, an onerous duty is cast upon A.6 to pin pointedly cross examine P.W.3 not only about his (A.6) presence in his house but also the presence of the other conspirators. A similar responsibility lies on A.7 and A.8 also. From the record we find that A.6 to A.8, who have been defended separately by their own counsel did not cross examine P.W.3 nor did they make any endorsement either on their own or by their lawyer on their instructions that they are adopting the cross examination of P.W.3 already done on behalf of A.1 to A.5. Now we go back to the cross examination of P.W.3 done at the instance of A.1 to A.5 and on going through it, we only get it reaffirmed that this witness is categorical about the conspiracy aspect of the prosecution case as spoken to by him in his evidence in chief. Therefore we have no doubt at all to hold even at this stage that P.W.3's

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evidence establishes the conspiracy as projected by the prosecution. He is the prime witness to the conspiracy. His evidence on the conspiracy aspect of the prosecution case gets strengthened by the oral evidence of P.W.4. Immediately we want to note here that this witness i.e P.W.4 was cross examined only by A.1 to A.5 and the counsel appearing for A.6 to A.9 had made an endorsement that A.6 to A.9 are adopting the line of cross examination already done by A.1 to A.5. The accused are always present in court when the trial goes on. When the counsel for A.6 to A.9 had taken so much of precaution to make an endorsement to adopt the cross examination done by A.1 to A.5 on P.W.4, we have no doubt at all that A.6 to A.9 conspicuously failed to cross examine P.W.3. In other words we want to make it clear that non cross examination of P.W.3 by A.6 to A.9 is at their own risk and it appears they had done it as a calculated move. On going through the entirety of the evidence of P.W.3 we are in a position to conclude that the prosectuion had established the conspiracy hatched. In this context, the Supreme Court in the judgment reported in 2003 S.C.C.(Cri.) 282 (SARWAN SINGH v. STATE OF PUNJAB) held as hereunder:-

> "It is a rule of essential justice that whenever the opponent has declined to avail himself of the opportunity to put his case in cross-examination it must follow the evidence tendered on that issue ought to be accepted."

19. Let us now examine the evidence of P.W.4 in so far as the conspiracy aspect is concerned. His evidence is that P.W.3 after coming from the house of A.6 told him what all he heard in the house of A.6. We have already narrated in the earlier portion of this judgment as to what P.W.3 heard when he was in the house of A.6 and therefore we are not restating once again what P.W.3 conveyed to P.W.4. Except the duration of P.W.3's work with P.W.4 and as to how many times P.W.3 would have gone to the house of A.6, nothing tangible had been elicited in the evidence of P.Ws.3 and 4 to disbelieve their evidence that the conspiracy was hatched in the house of A.6, in which A.1 to A.4 and A.6 to A.8 participated. The evidence of P.Ws.3 and 4 also gets credibility since they were examined during inquest by P.W.29. P.W.29's evidence show that inquest was conducted between 11.30 a.m. and 1.30 p.m. on 5.9.1991 in the hospital and during inquest besides examining P.Ws.3 and 4, P.Ws.1 and 2 were also examined. The inquest report and the statement of witnesses had reached the court on the next day. If the police Inspector/ P.W.29 had sent the inquest report along with the statements also to the court on the same day, the defence would have no chance to criticize the police that the records have been sent deliberately late to the court. In this context, we must not lose sight of the evidence of P.W.14, the independent Head Quarters Tahsildar, Coimbatore. His evidence, though short, speaks volumes about the tension that was prevailing at that time in Coimbatore City. Therefore the fact that the entire Coimbatore City was in the grip of fear on the occurrence day cannot be easily forgotten. P.W.14's evidence shows that even movements of people on the road and movement of vehicles have come to a standstill. Normal life in Coimbatore was fully

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affected. When such is the situation, we must appreciate the police officer that he almost took care to see that Exs.P.1 and P.40 reach the court at the earliest possible time. Under these circumstances, the delayed sending of the inquest report Ex.P.42 and the statement of witnesses attached to the inquest report, cannot and shall not vitiate the prosecution case. Under these circumstances, finding that P.W.29 did not commit any willful and deliberate delay in sending Ex.P.42 and the statements to the court and taking into account P.Ws.3 and 4 were examined during inquest itself, we are inclined to rate the evidence of P.Ws.3 and 4 highly. In other words, the evidence of P.Ws.3 and 4 is not found to be shaky at all on any material and their evidence, P.W.3 primarily and the evidence of P.W.4 as the evidence in corroboration, fully establishes the prosecution case that a conspiracy was hatched as projected by the prosecution. A faint argument is advanced by the learned Senior Counsel appearing for A.6 that neither P.W.3 nor P.W.4 was aware that Shiva, who is killed in this case is the centerpiece of conspiracy and it is not established which person by name Shiva was in the mind of the conspirators at that time. We have to only state that having regard to the close proximity of the date on which the conspiracy was hatched; the conspirators dealing with a person by name Shiva; Shiva being the point of attraction in the public meeting held on 30.8.1991; his contents of the speech being Ex.P.39 and the said Shiva coming to be murdered on 5.9.1991 would only lead us to hold that Shiva, who had been killed in this case, was the person in the mind of the conspirators and we have no doubt at all about that. We summarise our conclusion as hereunder:-

> " P.Ws.3 and 4 are reliable and natural witnesses. The evidence of P.W.3 establishes the conspiracy hatched in the house of A.6; the evidence of P.W.4 establishes by direct evidence that A.6, A.7 and A.8 alighted from the van and entered into the house of A.6; Seven known persons followed A.6 to A.8 inside the house of A.6; the conspiracy was hatched inside the house as witnessed by P.W.3; after the conspiracy A.6 alone remains in the house and others leave."

20. While we reflect our mind on the remaining part of the prosecution case in the latter portion of this judgment we will advert to the evidence available identifying the other persons as conspirators or as the actual assailants. We have already eliminated the presence of A.5 and A.9 as conspirators and acquitted them. Since we have found that there is direct evidence against A.6 to A.8 from the mouth of P.W.4 and the evidence of P.Ws.3 and 4 and that besides A.6 to A.8, others were also there, we went into their evidence in detail to find out who the other persons, whom they have identified to be present at the time of conspiracy. P.W.3 in his evidence had categorically stated that as the conspiracy was going on, A.7 touched A.1 and calling him by his name said that he is the fit person to commit the crime. P.W.3 had also identified A.3 in the Test Identification Parade held on 14.10.1991. P.W.3 is not an eye witness to the crime. Therefore when he had identified A.3 in the test identification parade, it only establishes that A.3 was present as a

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conspirator in the house of A.6 when the conspiracy was hatched. As far as A.2 is concerned neither P.W.3 nor P.W.4 identifies him as the person, who was present as a conspirator in the house of A.6 when the conspiracy was hatched. P.W.4 had identified A.4 in the test identification parade held on 6.2.1992. From the evidence of the Judicial Magistrate, who conducted the test identification parade, we are unable to find any infirmities. Therefore we are inclined to accept the evidence of P.Ws.3 and 4 that in the respective test identification parades, they have identified A.3 and A.4. As noted earlier P.W.4 is not an eye witness to the crime. Therefore when he identifies A.4 in the test identification parade, such identification would lead us to conclude that A.4 was present in the house of A.6 at the time when the conspiracy was hatched. We just recollect the evidence of P.W.4, who would state that initially A.6 to A.8, after alighting from the van entered the house of A.6, followed by seven known persons. His evidence is also to the effect that after the conspiracy, except A.6 the remaining came out of the house. Therefore we are inclined to hold that the evidence of P.W.4, from the fact that he identified A.4 in the test identification parade held, establishes A.4's presence as a conspirator in the house of A.6. In the light of our discussion, we come to the conclusion that except the involvement of A.1,3,4,6 to 8 (we have already acquitted A.5 and A.9) the State had not established the presence of A.2 also as a conspirator on 1.9.1991 in the house of A.6. Accordingly A.2 is acquitted of his conviction and sentence under Section 120-B I.P.C. and fine amount, if any paid by him for the said offence,would be refunded to him. In other words, the State had established that A.1,3,4,6,7 and 8 as the conspirators who hatched the conspiracy and the involvement of A.2,5 and 9 in the said offence is not proved.

21. This takes us to the next question namely, whether the prosecution had established the offence under Sections 148 and 302 I.P.C. There is evidence to show that six persons came running and attacked Shiva. One of the six is stated to be absconding. A.5 has not been acquitted doubting his presence at the crime scene. Therefore the prosecution evidence namely, the evidence of P.Ws.1 and 2 establishes the existence of an unlawful assembly; the unlawful assembly having the common object to commit the offence and the offence being to murder Shiva. Then it follows whether the prosecution had established their case against the accused. In analysing this issue, we will have to meet several points raised by the learned counsel arguing for the convicted accused. The foremost point, which according to us requires to be considered is whether the occurrence had taken place at 7.45 a.m. on 5.9.1991 or much earlier to that. An argument is built on this point stating that if the occurrence had taken place at 6.45 a.m. which is much earlier to the projected time, then P.Ws.1 and 2 could not have witnessed the crime at all. For sustaining this point, the defence mainly relies upon Ex.P.23, the Accident Register and the evidence of P.W.18, the Doctor, who issued the said Accident Register. We perused the original of Ex.P.23. P.W.18 would depose that Shiva, since deceased was brought before him by Prabhakar and

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Senthil Kumar (P.W.2) stating that in the occurrence that took place at 7.45 a.m. on that day Shiva is stated to have received the injuries. P.W.18 admitted when he was cross examined, that initially in Ex.P.23, it was written that the occurrence was reported to have taken place at 6.45 a.m. but it was corrected as 7.45 a.m. A perusal of Ex.P.23 shows such a correction. The argument advanced before this court is that from the evidence of P.W.18 and Ex.P.23, it is clear that the occurrence in which Shiva had come to sustain the injuries had taken place only at 6.45 a.m. and therefore P.Ws.1 and 2 could not have witnessed the crime. We find that P.W.18 had not been cross examined at all as to whether this correction was made at the time when he wrote Ex.P.23 or at a later point of time to suit the prosecution case. In the absence of such cross examination and in the face of the evidence of P.W.18 that he made the correction in Ex.P.23, we would not be committing any mistake in holding that such an error in noting the time might have been inadvertently made by the Doctor himself either on his own or on he being informed by those, who accompanied Shiva to the hospital and the correction was also made at the same time. In this context we perused the evidence of P.Ws.7,8,10 and 17. P.W.7 is an Autorickshaw driver by profession. He would state that when he had stationed his Autorickshaw in the Autorickshaw stand near the crime scene, he heard a commotion near the scene of occurrence at about 7.45 a.m. and he ran to the crime scene. Though he had been cross examined, yet, not even a suggestion has been put to him that there was no occurrence at all at 7.45 a.m. Then comes the evidence of P.W.8. He is another Autorickshaw driver, whose evidence also shows that at about 7.45 a.m. on the occurrence day a policeman and an young boy wanted his Autorickshaw. Once again we find that this witness was also not cross examined on his evidence in chief that at 7.45 a.m, the police man (P.W.1) and the young boy (P.W.2) wanted his Autorickshaw. P.W.10 is the third witness in the line, who also deposed that at about 7.45 a.m. on the occurrence day, he heard a commotion outside the house and when he came out, where he found a person lying in a pool of blood opposite to Godawari Textiles. The last of the witness is P.W.17 and he also deposed that at about 7.45 a.m. when he was in the control room he received information about the incident. We have to once again state that neither P.W.10 nor P.W.17 was cross examined disputing the time of occurrence. Besides the evidence of P.Ws.7,8,10 and 17 we have the evidence of P.Ws.1 and 2 also as to when exactly the occurrence took place. In the face of the overwhelming evidence of the witnesses referred to above and the oral evidence of P.W.18 also that he was informed that Shiva came to sustain the injury at 7.45 a.m. on the occurrence day, it is not possible to accept the argument advanced by the learned counsel appearing for the convicted accused that from the correction made in Ex.P.23 namely, correcting 6.45 a.m. into 7.45 a.m., it would show without any doubt that the occurrence did not take place at 7.45 a.m. but only at 6.45 a.m. Accordingly rejecting this argument we hold that the occurrence took place only at 7.45 a.m. on 5.9.1991 in which a person came to be fatally attacked.

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22. As far as the occurrence proper is concerned, we have the evidence of P.Ws.1 and 2 alone. A very forceful argument is made by the learned counsel appearing for the convicted accused that P.W.1 could not have been present at the crime scene at all and from the evidence of P.W.1 it is seen that P.W.2 also could not have witnessed the crime. Having in mind the arguments advanced by them, which we have noted earlier in great detail, let us examine the merits of the submission. To doubt the presence of P.W.1 in the crime scene the defence relies upon the evidence of P.W.1, P.W.17 and P.W.26, the Sub Inspector incharge of the control room. P.W.1 would state that immediately after the occurrence he made use of the telephone in a nearby shop belonging to a Marvadi. P.W.17 had been examined to prove that at 7.45 a.m. on the occurrence day, a policeman came to his house and making use of his phone with indicator No.44124 he made a phone call. The policeman informed P.W.17 that he wanted to speak to the police control room. P.W.26 is the Sub Inspector of Police incharge of the control room. His evidence is that when he was in the control room at 7.45 a.m. on 5.9.1991 a traffic police constable with No.896 made a call from a telephone with indicator No.49124 to the control room and informed about the crime. P.W.26's evidence makes it abundantly clear that the traffic constable, who made the call to the control room at 7.45 a.m. is having the assigned No.896. Ex.P.1 is the complaint lodged by a police constable. In that complaint the traffic constable has given his number as P.C.896. P.W.28 is the Sub Inspector of Police, who had registered the complaint given by the said police constable. P.W.28 would state that the complainant's name as Chinnathambi and number as 596. This number may be a typographical error or an inadvertant mistake committed by P.W.28. And we find that the name of the person, who lodged the complaint is the same. Therefore reading the evidence of P.Ws.1, 17, 26, 28 and the contents of Ex.P.1, we have no doubt at all that it is only P.W.1 and P.W.1 alone, who had made the call to the control room about the incident. The above referred to material, in our considered opinion, prima facie establishes the presence of P.W.1 at the spot. Therefore the non-production of any records namely, general diary or any other record in the police station disclosing that P.W.1 was assigned the duty to be at the crime scene, would not in any way affect the prosecution case that it is only P.W.1 and P.W.1 alone, who was present to do duty at the crime scene. Another argument is made by the learned counsel for the convicted accused stating that P.W.1's presence at the crime scene can also be doubted from the text of the message shown to have been conveyed at the time when he called the control room. For this purpose we are taken through the evidence of P.W.26. What P.W.26 had deposed in court is that P.W.1 informed him that a person had been done to death; there is a crowd and therefore a police vehicle must be sent. P.W.1 in his evidence states that he informed the control room about the actual occurrence itself. According to the defence counsel what P.W.1 deposed in court about what he conveyed to the control room and what message was actually received by P.W.26 are contradictory to each other namely, P.W.1's evidence would show that he conveyed the details of the actual occurrence itself while P.W.26's evidence would show that P.W.1 only reported the incident which had already taken place. We

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are afraid, we cannot agree with the submission made by the learned defence counsel. In our considered opinion the evidence of P.W.1 and P.W.26 do not give any room at all to doubt P.W.1 as the eye witness to the crime. In other words, from the evidence of P.W.26 it is not possible to eliminate the presence of P.W.1 as the eye witness to the crime.

23. Taking us through the evidence of P.W.13 the Doctor, who examined P.W.1, it is contended that the injury found on the palm of P.W.1 could have been a self inflicted injury and if a person, as claimed by P.W.1, snatches the knife from the assailant, then there will be a more serious injury on the person than the simple injury found on P.W.1. P.W.13 also admitted that the injury found on P.W.1 might have been caused even by the use of an ordinary blade. Assuming that P.W.1's evidence that as he neared the scene A.1 attempted to stab him and while he tried to snatch the weapon he received the injury, is an exaggerated version (in our considered opinion, it is not so), even then it would not enable us to doubt the presence of P.W.1. It is needless to state that when a person attempts to stab another person on his palm, the person who is to be attacked would not show his palm, so as to enable the assailant to stab in the palm. There is every possibility of a person like P.W.1 moving his palm one way or the other and therefore there should be a bright possibility of P.W.1 coming to sustain only the injury as found noted on his person. The nature of injury would depend upon the position of the palm and the position from which the assailant was attacking. Therefore it cannot be said, from the nature of the injury found on P.W.1, that P.W.1's presence must be necessarily doubted. Therefore we reject this argument also. It is then submitted by the learned counsel for the defence that the conduct of P.W.1 - especially when he is a policeman, needs criticism at the hands of this court. According to them, P.W.1, instead of following the victim to the hospital, ought to have rushed to the police station first to give the complaint, which he did not do. Even assuming he was right in going to the hospital by following Shiva, nothing prevented him from giving the complaint in the police out post in the hospital itself, which also he did not do. From these two failures on the part of P.W.1, it is argued that this court must hold that P.W.1 was not at the crime scene and he was brought into the picture later on by the police to give a colour to the prosecution case. Once again we will have to state that we are totally unimpressed with the argument advanced by the learned counsel appearing for the defence. The occurrence was at 7.45 a.m. At 8.05 a,m. Shiva, since deceased was in the hospital. P.W.18 speaks so. The crime scene is at a distance of 2 km from the police station as could be seen from Ex.P.40, the printed First Information Report. Though P.W.1 in his evidence in cross had stated that the investigating police station as well as B.2 police station is at a distance of only 100 feet on either side of the place of occurrence, we have to state that this evidence is only due to an inadvertent error, since Ex.P.40 on the face of it shows that the crime scene is at a distance of 2 km. No worthy cross examination had been made to P.W.29 that the crime scene is at a close quarters to the police station. We find from the evidence of P.W.1 that on

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reaching the hospital following Shiva, he was informed that Shiva had already died and therefore from the hospital he reaches the police station at about 8.30 a.m. and gives the complaint. Therefore from the sequence of events as referred to above, we do not find that P.W.1 had conducted himself in such a drastic manner warranting criticism at the hands of the court and thereby to disbelieve him as an eye witness to the crime. In other words, in our considered opinion, what P.W.1 is shown to have done after witnessing the crime is a normal human conduct and it cannot be condemned as an unusual conduct of a person, who had witnessed the crime.

24. It is true that P.W.1 in his evidence had stated (even in chief examination) that as the accused started moving away from the crime scene P.W.2, the younger brother of Shiva, since deceased came running and shouted. This evidence is heavily relied upon by the defence counsel to contend that P.W.2 could not be an eye witness at all to the crime. It must be noticed that six persons were chasing Shiva and ultimately on he being overpowered the fatal attack took place. P.W.2 would state that his brother left the house at about 7.15 a.m. to go to his vegetable shop in Saibaba Colony and within a short time thereafter his relative by name Rangarajan informed him that he saw his elder brother Shiva, since deceased being chased by some Muslims in the Main Road. The occurrence was in the year 1991. P.W.2 when he gave evidence in Court in 2002 was 28 years of age and therefore P.W.2 would have been in the age group of 17 or 18 years at the time when the crime was committed. P.W.2's evidence is, on such information given to him by Rangarajan, he started running in the direction in which his brother had left. When P.W.1 was witnessing the occurrence, it is possible for him to note, who are the other persons present at the crime scene. Equally it is also not possible for him to note the minute details about the crime itself and the other persons, who are at the crime scene. P.W.2's evidence is that as he came running, he found near Godawari Textiles his brother being attacked. P.W.2 also speaks about the presence of P.W.1 and as to how he came to sustain the injuries. Therefore merely because P.W.1 did not notice the presence of P.W.2 during the thick of the occurrence time, it does not necessarily mean that P.W.2 would not have been present at all at the crime scene. As noted earlier, how far a person would perceive the occurrence and the persons present around the occurrence scene, would vary from individual to individual. Under these circumstances from the evidence of P.W.1 that as the accused were about to move P.W.2 came running and shouted, cannot be taken to mean that P.W.2 was not at the crime scene at all and he came to the crime scene only after the occurrence is over. Therefore reading the evidence of P.Ws.1 and 2 together and for the reasons stated earlier, we have no doubt at all in our mind that the prosecution had definitely established the presence of P.Ws.1 and 2 at the crime scene when the occurrence took place, as eye witnesses.

25. Having held that P.Ws.1 and 2 were present at the crime scene and they witnessed the incident, let us examine their evidence to find out whether their evidence establishes the involvement of all or any of the

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accused in perpetrating the crime on the victim. P.W.1 had stated in his evidence that A.1 sitting on the person of Shiva, who had already fallen down, repeatedly stabbed him on his face. A.3 also stabbed Shiva on his body. According to P.W.1 totally six persons were in the crime scene and except the absconding accused by name Mujbur Rahman, rest of the five accused are in court. P.W.1 had identified A.3 in the test identification parade held on 14.10.1991. P.W.1 had also identified A.4 in the test identification parade held on 6.2.1992. We have already referred to the evidence of the Judicial Magistrate, who conducted the test identification parade and we have also noted that there was no infirmity at all either in the conduct of the test identification parade or in the capacity of the witnesses identifying the suspected assailants. P.W.1 is also categorical in his evidence that at the occurrence time except the absconding accused Mujbur Rahman, the remaining five in that mob are present in court. Though P.W.1 had been cross examined at length, we do not find any material that had come out in his evidence in cross, which would enable us to disbelieve his evidence in chief about the involvement of six persons in perpetrating the crime and out of whom he had identified A.1, A.3 and A.4 as the persons present in the crowd of six. Of course he had implicated in his evidence A.7 and A.9 as the persons, who were among the six. But unfortunately we find that there is no charge against A.7 and A.9 either under Section 148 I.P.C. or under Section 302 I.P.C. Therefore in the absence of a charge as indicated above, it is not possible for us to accept the evidence of P.W.1 that A.7 and A.9 are too among the crowd of six, who perpetrated the crime on the victim. It is true P.W.1 had admitted when he was cross examined that he had not mentioned in the complaint given by him that he knew the entire details of all the six assailants. But however in Ex.P.1 we find that he had mentioned the name of A.1. During inquest, he had given the names of A.1 to A.3. P.W.2 would state that on reaching the occurrence he saw A.1 to A.3 with three other known persons standing with knives. He also noticed A.1 and A.3 stabbing Shiva, his elder brother. P.W.2 even in his inquest statement had mentioned the names of A.1 to A.3. The inquest was between 11.30 a.m. and 1.30 p.m. on the occurrence day. P.W.2 had also identified A.1 to A.3 in court also. We find nothing in his evidence to show that he did not know A.1 to A.3 earlier. P.W.2 was also cross examined at length. In cross examination he asserted that though he is not acquainted with A.1, yet, he had seen him a number of times in the road. As noted earlier at the earliest point of time when he was examined during inquest he had given the name of A.1. He had implicated A.2 also during inquest. Therefore it is clear from the evidence of P.Ws.1 and 2 that they have not only witnessed the occurrence but they have also given the names of A.1 to A.3 at the earliest point of time namely, during inquest. P.W.1's presence establishes the presence of A.1, A.3 and A.4 at the crime scene and P.W.2's evidence establishes the presence of A.1 to A.3. Again and Again we went through the evidence of P.Ws.1 and 2 to find out whether they have given any room to doubt their evidence and we found no material in favour of the accused. Consequently without any hesitation, we hold that by examining P.Ws.1 and 2 the prosecution had definitely established the

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occurrence and the involvement of A.1, A.3, A.4 (P.W.1) and A.1 to A.3 (P.W.2). It is true that from the crime scene a number of blood stained slippers have been recovered. It is also true that foot prints of A.1, A.3 and A.5 have been taken during investigation. It is an admitted fact that those foot prints of A.1, A.2 and A.5 and the foot prints available in the recovered slippers from the crime scene were not subjected to any expert's examination. It is for the investigating officer to decide in what manner he must go about the investigation. In the face of the overwhelming evidence of P.Ws.1 and 2 regarding the occurrence proper, we are of the considered opinion that failure to send the foot prints of A.1,2 and 5 to an expert for examination with the foot prints available in the slippers recovered from the crime scene is of no significance at all. Likewise, the evidence on record show that the contents of Exs.P.5 and P.6 are not tallying with the signature of any of the accused. We will have to state once again that it would not affect the prosecution case, so long as there is evidence of P.Ws.1 and 2 regarding the occurrence proper.

26. In addition to the evidence of P.Ws.1 and 2 regarding the occurrence proper and the evidence of P.Ws.3 and 4 regarding the conspiracy we have the evidence of P.W.12 also. On going through his evidence, we are in entire agreement with the learned counsel for the defence that his evidence appears to be very artificial. P.W.12 was examined only three days after the crime. This raises a serious suspicion in our mind as to whether his evidence could be believed at all and accordingly we hold that his evidence does not deserve any consideration. But however excluding the evidence of P.W.12, this court has still the evidence of P.Ws.1 to 4 about the two aspects of the prosecution case, which evidence we have accepted. By drawing our attention to Ex.D.1, the remand report filed, Mr.AR.L. Sundaresan, learned Senior Counsel would contend that the remand report discloses that P.W.1 appeared in the police station before P.W.27 only at 9.00 a.m. to give the complaint on the occurrence day. But however Exs.P.1 and P.40 the complaint and the printed First Information Report show that P.W.1 appeared at 8.30 a.m. on 5.9.1991 to give the complaint. Exs.P.1 and P.40 had reached the court at 12.40 p.m. on the same day. The time mentioned in the remand report that P.W.1 appeared at 9.00 a.m. to give the complaint is not such a telling factor to disbelieve the prosecution case. In our opinion, it is only an inadvertent error and when P.W.29 was cross examined on the contents referred to above in Ex.D.1, he had stated that it is an inadvertent error. To summarise we state that the evidence of P.Ws.3 and 4 establishes the conspiracy hatched by the accused mentioned by us and the evidence of P.Ws.1 and 2 establishes the occurrence proper. However, as noted earlier, the prosecution had not established the involvement of A.2, A.5 and A.9 as conspirators. But however the prosecution had established the involvement of A.1 to A.4 in the occurrence proper. Since the learned Trial Judge had already acquitted A.5 from the charges under Sections 148 and 302 I.P.C. and since it had been allowed to become final, we cannot interfere with the acquittal of A.5 of the charge under Section 302 I.P.C. Even otherwise we find from the materials on record that neither P.W.1 nor

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P.W.2 speak about the presence of A.5 at the crime scene. There is medical evidence on record to show that Shiva died due to homicidal violence. As far as the conviction of A.1 under section 332 I.P.C. is concerned, we find that there is evidence of P.W.1, the injured himself, which is corroborated by the medical evidence. We have already referred to the medical evidence available in this case.

26. In the light of our discussion, all the appeals stand disposed of as hereunder:

C.A.No.1200 of 2003 stands dismissed since we find no infirmity in the judgment of conviction rendered against A.6.

C.A.No.1253 of 2003 stand allowed since his conviction is only under Section 120-B I.P.C. and as we have found that the prosecution had not established his involvement as a conspirator. Fine amount if any paid by him for that offence is directed to be refunded to him. It is stated that A.5 is on bail. Bail bond, if any executed by him shall stand terminated forthwith.

C.A.No.1459 of 2003 is dismissed. But however, A.2's conviction under Section 120-B I.P.C. alone is set aside since there is no legal evidence to connect him with the conspiracy. Fine amount if any paid by A.2 for the offence under Section 120-B shall be refunded to him forthwith.

C.A.No. 291 of 1991 is allowed since A.9 stands convicted only under Section 120-B I.P.C. and we find that there is no legal evidence to connect him with the crime. A.9 is stated to be in prison. Accordingly, he is directed to be released forthwith unless his detention is required in connection with any other case. Fine amount, if any paid by him shall be refunded to him forthwith.

Tr/

Sd/
Asst. Registrar

/true copy/

Sub Asst.Registrar

To

1. The Addl. District and Sessions Judge (FTC No.3),Coimbatore.

2. -do- through Principal Sessions Judge, Coimbatore.

3. The District Collector, Coimbatore.

4. The Director General of Police, Chennai.

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5. The Public Prosecutor, High Court, Madras.

6. The Superintendent, Central Prison, Coimbatore (A.9)

7. The Superintendent, Central Prison, Salem (A.5)

8. The Superintendent, Central Prison, Chennai (A.2)

9. The Inspector of Police,B-1 Bazaar Police Station
Coimbatore District.

+ One cc to M/s. AL. Ganthimathi Advocate SR 54286
+ One cc to Mr. N. Manokaran Advocate SR 53570
+ One cc to Mr. John Sathyan Advocate SR 53725
+ One cc to Mr. V. Purushothaman Advocate SR 53231

BV (co)
sg 19/12/06

Crl.A.Nos.1200, 1253,
1459 of 2003 and
291 of 2004

8.11.2006

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